No. 114.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

EXCHANGE TRUST COMPANY, EXECUTOR OF THE ESTATE OF BOY RICE, DECEASED, PLAINTIFF IN ERROR,

vs.

DRAINAGE DISTRICT No. 7 POINSETT COUNTY, ARKANSAS, AND ITS COMMISSIONERS AND THE ST. FRANCIS LEVEE DISTRICT AND ITS BOARD OF DIRECTORS, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

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For the Levee District.

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Jonesboro, Arkansas,
For the Drainage District.

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ADDITIONAL STATEMENT OF FACTS BY DEFENDANTS IN ERROR.

First. Correction of statement of plaintiff in error.

In the statement and brief of plaintiff in error, there are several recitals that might leave the impression that benefits were assessed against the lands in controversy, tax levies made upon those benefits, plans filed for improvements, and bonds issued prior to the

date of the final certificate of entry to Roy Rice, the person who entered these lands under the homestead laws. The date of that final certificate of entry was February 14, 1919.

These erroneous implications might arise from page 6 paragraph 3 of brief of plaintiff in error; page 8, the last paragraph on the page; page 20, first paragraph, and page 20, third paragraph; page 21, second paragraph, giving the date of the first bond issue.

We realize the great difficulty of fairly stating the facts in a complicated case in brief form, but justice to our clients compels us to correct these inferences in the most emphatic manner. We therefore, want to make it very clear that none of the lands embraced in the controversy were included within the original boundaries of the district and they were not included within the district until an order of the County Court of Poinsett County rendered upon the petition of the owners of such lands upon March 15, 1918. This is made very clear in the stipulation (Rec. p. 27-28), as follows:

> "No land in Township 12 North, Range 7 East, was included within the original boundaries of the said drainage district as described in said Act 193.
>
> "Said drainage district, after organization, filed plans on January 17, 1918, *not including any contemplated improvement east of the west bank of the St. Francis River.* Said report of the original plans appears on County Court Record "H," p. 348 and the plans were approved by the county court on January 17, 1917 as shown in County Court Record "H," pages 364 to 365.
>
> "On January 22, 1918, the drainage district reported to the county court their assessment of benefits and damages to lands at that time em-

> braced within the proposed improvements and the same is covered by County Court Record 'H,' page 366. *No assessments were filed as to any land in Township 12 North, Range 7 East, at that time*" (italics ours).

This statement of the stipulation is borne out further by the petition of Roy Rice and others to be included within the district (Rec. pp. 28-30), and the further provision of the stipulation (Rec. p. 31) as follows:

> "The foregoing petition and order were the first steps taken towards the annexation of the lands embraced in said petition and order."

The order referred to was the order of notice of a hearing upon the petition (Rec. p. 30).

The order of the County Court of Poinsett County adding the lands in controversy to drainage district was rendered March 15, 1918, upon the petition of Roy Rice and others (Rec. pp. 35-36).

The first plans ever filed for any improvements upon the lands east of the St. Francis River and upon the lands in controversy were filed May 24, 1919 and the circumstances concerning the addition of said territory in controversy are fully set out in the order of the county court fixing a day for hearing upon the approval of plans and assessments shown on record pages 37-42, inclusive.

The judgment confirming the plans as to the lands in controversy and confirming and establishing the assessment of benefits and damages was rendered in the County Court of Poinsett County on June 23, 1919 and

at said hearing a very large number of landowners appeared (Rec. pp. 44-50). This order fully recites the facts concerning the addition of said lands to the district on March 15, 1918.

The plans first filed on January 17, 1918 and the assessment of benefits filed on January 22, 1918 did not affect the land in controversy nor any lands east of the St. Francis River, as shown by the above stipulation and certainly the bond issue dated January 1, 1918 to support which a levying order was rendered by the county court on July 12, 1918, does not affect the land in controversy and any inference from the manner of statement adopted by plaintiff in error to that effect would be entirely incorrect (Rec. pp. 92-95).

A reference to this levying order shows that the bond issue was for $1,400,000.00 dated January 1, 1918, was based upon an aggregate assessment of benefits of $3,314,805.67 (Rec. p. 93).

The first bond issue affecting the lands in controversy was supported by a levying order of September 1, 1919, the bonds being dated August 1, 1919 and in the amount of $2,200,000.00. The assessment of benefits after the addition of the territory in controversy, the 50,000 acres more or less, east of the St. Francis River, had been increased to $4,743,807.50 (Rec. p. 95).

We repeat that Roy Rice originally entered the land in 1913, remained in possession and procured final certificate of entry on February 14, 1919, and received his patent on June 3, 1919 (Rec. p. 69).

Hence we wish to correct the brief of plaintiff in error at the points mentioned, and any other points in

which the brief seems to imply that there was any plan or assessment of benefits or bond issue affecting the land in controversy prior to June 23, 1919, which was about four months after the final certificate of entry of the land in controversy and twenty days after the actual issuance of the patent to Rice. Therefore the land of Roy Rice, in controversy, had passed from the United States Government and into private ownership more than four months before the filing of plans and assessments of benefits for improvements that were later to be constructed affecting those lands.

Second: Although not more than 5000 acres of land are directly involved in this controversy (Rec. pp. 69-70) yet the decision in this case will affect several hundred thousand acres of land within the St. Francis and Little River basins comprising in fact that entire acreage which has been before the courts on numerous occasions under the guise of "Sunk Lands" of the St. Francis and Little River Basins, or "Unsurveyed Lands," which were meandered in the original government surveys and which were resurveyed by the government during the past twenty years.

No one can deny that the construction of the St. Francis levee along the west bank of the Mississippi River has created practically all the value that exists in these "Sunk Lands" by keeping back the flood waters of the Mississippi. The levee has made possible the construction of drainage ditches and levees in the basin and has made a garden spot out of these swamps.

The question involved is whether or not the present owners of these former "Sunk Lands" shall pay

any part of the assessment for the improvements which are creating the value of their lands, or whether these owners shall entirely escape taxation while their neighbors pay the whole cost of these improvements. In the drainage district case there is the additional question whether these owners can thus escape taxation and shift the burden to others even though they petitioned for the improvement and for the inclusion of their lands within the district and for the imposition of the tax. We believe the questions herein presented are entirely distinct upon the facts from those presented in the case of

> *Lee v. Osceola and Little River Road Imp. Dist. No. 1, Mississippi County*, 268 U. S. 643.

The St. Francis Levee District for many years has followed the practice of assessing lands for levee purposes after the date the final certificate of entry was issued by the government and this practice was never challenged until the decision in the Lee case was rendered. Within six months after the decision in the Lee case was rendered this and numerous other suits were filed attacking all levee and drainage assessments within the St. Francis and Little River basins.

As shown in our first division of this statement of facts, there were no plans filed affecting the lands in controversy until after February 14, 1919, the date final certificate of entry was issued to Roy Rice. The plans and the assessments of benefits were not filed until May 24, 1919 and the hearing and establishment of such plans and assessments by the judgment of the county

court was not had until June 23, 1919 (Rec. p. 44). At this time final certificate of entry and actual patent had issued to Roy Rice, the entryman, to whose title plaintiff in error has succeeded.

As to the drainage district, therefore, there was no assessment of the lands in controversy during any portion of the time that title to the land remained in the government.

As to the levee district, no assessment was attempted until after issuance of the final certificate of entry and in making the assessments the levee board followed the routine practice set out in

> Amendatory Act 272, Sec. 4, Vol. 2, Acts of Ark. 1917, p. 1448

Another striking fact entirely distinct from the Lee case was that Roy Rice, deceased, and a large number of other landowners, his neighbors, in the territory east of the St. Francis River petitioned for the inclusion of their lands within the boundaries of Drainage District No. 7 and even petitioned the drainage district board and the County Court of Poinsett County to assess those lands in proportion with the assessments against other lands of the district (Rec. pp. 28-30, 66-76).

Another unusual circumstance present in this controversy, but not in the case of *Lee v. Osceola Road District* above referred to is that long after the issuance of even the patent by the government to Roy Rice, in fact, three years later, on April 5, 1922, the plans of Drainage District 7 were changed in very material respects, affecting all of the territory of the district,

including the territory in controversy, and a complete revision of the assessment was presented in the County Court of Poinsett County (Rec. pp. 57-66, 77-90).

The reports of the board and its engineers and the judgment of the court rendered in that cause at a hearing wherein a very large number of landowners appeared, indicate that this reassessment upon the modified plans, constitutes substantially an independent and new assessment of benefits. In view of the fact that it was made practically three years after the patent issued, we contend that the drainage district assessment in the present case is clearly sustainable even if we disregard all occurrences previous to the 1922 reassessment.

This reassessment of benefits of June 1, 1922 was cured and confirmed, as were also the revised plans of the district, by Act 657 Special Acts of Arkansas of 1923 p. 1638, approved March 23, 1923, which was practically four years after the land in controversy had been patented by the government to Roy Rice. We copy this act in another place in this statement.

A further fact (which, so far as we can observe, is not mentioned in the brief of plaintiff in error) is that neither the work of the drainage district nor of the levee district was completed prior to the time the title passed from the United States, nor was such work completed at the time the lawsuit was tried in the lower court. In the drainage district there remains $136,888.00 of estimated cost of work still unfinished in the eastern part of the district and surrounding the land in controversy, while $32,888.00 worth of work re-

mained uncompleted at the date of trial in the Chancery Court, west of the St. Francis Lake and floodway (Rec. pp. 90-92).

As to the levee board, the plans are continually changing on account of the changing course of the Mississippi River, caving of banks, increased development of the territory, and increased flood height of the Mississippi River. Hence the levee district contends that it is not a completed improvement and, in the nature of things, can never be wholly completed on account of changing physical conditions.

The court will please observe further that on account of the addition of the territory east of the St. Francis River upon the petition of Roy Rice and other owners of land, the drainage district incurred an expense of $2,050,455.78 upon the work east of the St. Francis River which was not contemplated in the original act creating the district. That land was added to the district on March 15, 1918 and the expenditures did not begin until 1920, the last item in evidence being as late as 1925. (Rec. pp. 90-91).

As to both districts foreclosure decrees for delinquent assessments were regularly rendered by the Chancery Court of Poinsett County for the installments of the assessment due for five consecutive years, as to the drainage district being the installments from 1920 to 1924, inclusive, and as to the levee district the installments of 1921 to 1925, inclusive. (Rec. pp. 99-103, 119). No question is raised that these decrees followed the statute and constituted due process of law and under each of the decrees there was a sale by

the commissioner to the respective districts and a confirmation later by the court and a deed. These ten foreclosure suits, in which Roy Rice could have raised the issues he raises in the present suit, should constitute *res judicata* of the matter in the present suit and should bar the maintenance of this suit.

Both the drainage district and the levee district have issued large amounts of bonds, the levee district having issued $5,532,000.00 of bonds (Rec. p. 118) and the drainage district $5,373,500.00 of bonds (Rec. pp. 98-99). The first bond issue of the drainage district, dated January 1, 1918, the levying order for which was rendered July 12, 1918, was not based upon any assessment of the land in controversy. This fact appears from the dates given in a previous part of this statement of facts.

History of the St. Francis Levee District, as Concerns the Lands in Controversy.

The lands in controversy constitute a portion of the "Sunk Lands" of the St. Francis and Little River Basins which subsided during the New Madrid Earthquake of 1811. Until the building of the St. Francis Levee along the west bank of the Mississippi River practically all the lands in controversy were overflowed annually by the floodwaters of the Mississippi River. When the original government surveys were made, about the year 1840, large portions of the territory were meandered by the surveyors and shown on the plats as "Sunk Lands" or lakes and bayous. If the St. Francis levee had not been built doubtless these

lands would still be swamps and only a small portion of the basin would be subject to cultivation.

In the year 1893, by the act cited by plaintiff in error, the General Assembly of Arkansas created the defendant St. Francis Levee District, constituted it a body corporate, put directors in control, laid upon it the duty of constructing a levee on the west bank of the Mississippi River to keep the flood waters of the Mississippi out of the St. Francis Basin, provided for an assessment of the benefits estimated to accrue to the lands and gave the board the right to issue bonds and pledge the assessment of benefits to the payment of those bonds.

A review of the powers of this board is contained in the decision of the Supreme Court of Arkansas upholding the district.

Carson v. *St. Francis Levee Dist.*, 59 Ark. 513.

Work progressed rather slowly, the first plans for the improvements being filed in 1896. The levee first planned was to contain 8,660,377 cubic yards and to cost $1,299,697.00, the amount of tax being estimated at four cents per acre per year. This levee was intended to protect only against medium floods since "at that time the area of the levee district comprising approximately 1,600,000 acres was practially a swamp and largely undeveloped. Much of this land belonged to the state and was considered worthless" (Rec. p. 107).

On account of the increased flood heights of the Mississippi River, the development of the territory necessitating increased protection, the caving banks of the Mississippi River and changing channels thereof,

large number of entries in Township 12 North, Range 7 East were shown beginning with 1913 (Rec. pp. 69-70).

The government brought suit to establish and quiet its title to said lands and a large amount of other lands not in controversy, and on May 7, 1918 a decree was rendered establishing the title of the government and enjoining other claimants from "interfering directly or indirectly with the peaceable possession and enjoyment of said described lands, or any part thereof, by qualified entrymen, lawfully claiming or asserting rights thereto under the plaintiff, in compliance with the Federal statutes and rules and regulations of the General Land Office relating to homestead entries" (Rec. p. 104).

Hence we say that the very decree which quieted the title of the United States to these lands recognized that Roy Rice and other homesteaders were the legal parties in interest and protected their title.

History of the Drainage District as to the Lands in Controversy.

The drainage district was created by Acts 1913, Vol. 1, Act 186, p. 1064.

A board of directors was named, the power was given to build drainage ditches and levees, to plan improvements, and to assess benefits and damages as to all lands affected by the plans. Such assessment of benefits and damages required confirmation by judgment of the County Court of Bennett County and appeals were provided for, the district was given the power to issue bonds and to levy an annual tax based

upon the said assessment of benefits and to pledge its revenues for the payment of the bonds.

No part of the land in controversy was embraced within the original boundaries of the drainage district as contained in that act, nor were any of the lands in controversy affected by the plans nor assessments first filed by the district. (Stipulation, Rec. 27-28, and see corrections in first part of this statement.)

Section 16 of the act provided that additional territory outside of the boundaries of the district might be annexed to the district by order of the county court "when a majority in land value, acreage or number, shall have petitioned said court for such annexation." The petitioners were required to give notice of the filing of said petition and a hearing in county court was provided and in the event the court should annex the lands they were to be assessed and taxed by the district proportionately with the lands already included in the district.

At the same session which created Drainage District No. 7 of Poinsett County, a large companion district was created in Mississippi County in the same river basins just northeast of Poinsett County. This was Drainage District No. 17, of Mississippi County. The natural outlet for the waters of Drainage District No. 17 of Mississippi County was southwesterly down the Little River and St. Francis Basins into Poinsett County. However, the districts did not join and there was a gap between them containing approximately 40000 acres of land and including the territory in controversy and in fact all of Township 12 North, Range 7 East.

Just north of this "No Man's Land" of some 50,000 acres were other wet and low lands in Craighead County. Messrs. Satterfield and Finn, acting as attorneys for the landowners of this block of territory left between the upper Drainage District No. 17 of Mississippi County and the lower Drainage District No. 7 of Poinsett County, undertook to organize under the general drainage statute of Arkansas a separate district to drain the 50,000 acres of land together, possibly, with lands in Craighead County. Petition for such a district had actually been filed in court (Rec. p. 72). It appeared impossible to establish this middle district, however, because, in the first place, it was very low and wet and the cost of drainage would be high and, second, it would have no outlet without the consent of Drainage District No. 7 of Poinsett County. The court should bear in mind that Drainage District No. 17, of Mississippi County was planning to empty its waters upon this 50,000 acres and Drainage District No. 7, of Poinsett County expected only to protect its territory by constructing a levee along the west bank of the St. Francis River, which would leave this 50,000 acre block of land subjected to a flood from above and cut off in part by a levee below and, consequently, with an insufficient outlet.

In view of this dangerous situation, Messrs. Satterfield and Finn representing the landowners of the territory in controversy and other landowners, decided that the best thing for them to do was to annex their lands to Drainage District No. 7 of Poinsett County so that that district would embrace them in its protective plans.

The record reflects that the board of directors of Drainage District No. 7 were somewhat reluctant to undertake this additional burden. They feared in the first place that it would lead to litigation and thus delay their own plans; next, they feared that the expense would be vastly increased and, next, that delay would ensue which would injure the lands west of the St. Francis River which were the only lands protection for which was contemplated by their original plans. These facts are reflected in the stipulation, letters and minutes of the board referring to the proposal to add the territory in controversy to Drainage District No. 7, as shown in Record, pp. 70-77 and 66-68. The latter series of pages show the minutes of board meetings of Drainage District 7 at which the addition of said lands was consdered.

Finally the board agreed that if the landowners of the territory east of the St. Francis River in Poinsett County would prepare and file their petitions for the annexation of their lands and for the taxation of such lands, Drainage District No. 7 would not contest the annexation, provided, however, that the addition of said lands "would not delay the filing of the reports and plans nor any other proceedings, and would not increase the cost to property owners in the present bounds of Drainage District 7" (Rec. p. 67). The correspondence shows that an additional proviso was that the addition of the territory should not increase "the probability of a contest from landowners in the lower end of the district" (Rec. p. 72). The correspondence shows further that under the very terms of

the agreement, the board of directors of Drainage District No. 7 were to proceed forthwith to file their original plans and assessments so as to save delay and later revise them *if* and *when* these lands should be added (Rec. pp. 74-75).

It was this understanding and the fear of litigation by landowners in the original district that caused the district to file its original plans early in 1948 which had nothing to do with the lands in controversy although the manner of statement thereof in the brief of plaintiff in error might seem to imply that these plans and assessments concerned the added lands.

The form of petition for the annexation of these lands was actually sent by Mr. Satterfield to the attorneys for the drainage district before that petition was circulated for signature (Rec. p. 76). The stipulation recites and the order shows that this petition was circulated, presented to the court, notice given, and the hearing had at the instance of Messrs. Satterfield and Finn representing the landowners of the territory in controversy and other lands east of the St. Francis River, and the sole extent to which the drainage district participated in those proceedings was that its "attorney appeared in the county court and orally stated to the court that Drainage District No. 7 would not object to the addition of said territory if the taxpayers desired their lands added" (Rec. 76-77).

It is important to note at this point that this petition for the annexation of this territory went further in language than the law required, because it not only requested the board of directors of said district and the

county court to annex the lands of petitioners to the district, but also prayed that benefits and assessments be levied against said lands in accordance with their proportionate part of the cost of draining, protecting and reclaiming the same (Rec. p. 29). This petition was signed by Roy Rice, deceased, who is succeeded in title by the plaintiff in error.

The drainage district took no part in filing the petition nor otherwise, but it was filed by Messrs. Satterfield and Finn, as attorneys for the petitioners (Rec. p. 30) and on March 5, 1918, the petitioners, through their attorneys, presented the petition to the court and procured the order annexing said lands to the district. That order expressly provided that "there be levied against said territory and lands so annexed in accordance with the benefits which the same will respectively receive, such benefits and assessments as may be necessary to pay its proportionate cost of draining, reclaiming and protecting the same" (Rec. p. 30).

At the next session of the General Assembly the addition of said lands was confirmed and approved by Act 55, Spec. Acts 1919, p. 52.

This act was approved February 4, 1919, eleven days before Rice received his final certificate of entry but four months prior to the time when the first plans and assessment affecting the lands of Roy Rice in controversy were established, which was on June 23, 1919. This date was twenty days after the actual issuance of the patent to Roy Rice.

The first bond issue, dated January 1, 1918, had nothing whatever to do with the lands in controversy

and this is shown not only by the stipulation but by the recital of the estimated cost and benefits and by the entire record.

The first assessment of benefits upon the land in controversy, being the land added by order of the county court on March 15, 1918, was filed on May 24, 1919, notice was given and on June 23, 1919, the first assessment upon said lands in controversy was established by court order (Rec pp. 37-42).

The first issue of bonds based upon any assessment of the lands east of the St. Francis River was supported by levying order dated September 1, 1919 (Rec. p. 95). The first bond issue based upon any assessment upon the lands in controversy or any lands annexed to the district, were dated August 1, 1919 (Rec. p. 96).

As previously recited, the total bond issue gradually grew until it became $5,373,500.00 of which practically half was expended in improvements affecting lands east of the St. Francis River which were added upon the petition of Roy Rice and others on March 15, 1918.

No contract was let affecting the added territory east of the St. Francis River until August 20, 1919, and later several other contracts affecting the territory in controversy were let some being as late as 1924 (Rec. 90-92).

The improvements of the district have never been completed and on the day of trial there remained of estimated work to be done east of the St. Francis River affecting the land in territory $1,500,000.00 while $22,000.00

was estimated to remain unfinished west of the St. Francis River (Rec. pp. 91-92). Numerous court hearings were had and a large amount of work has proceeded and it is evident that Roy Rice must have known of the tremendous expenditures and operations of these dredge boats beginning as early as 1920. Very heavy expenditures in that territory are shown from the years 1920 to 1925. Yet no objection was made to the assessment nor to the annual tax until the present lawsuit was filed on December 12, 1925 (Rec. p. 9), following by some six months the decision of this Honorable Court in the case of *Lee v. Osceola Road District*, *supra*.

At the time of filing this lawsuit Roy Rice and his companions, many of whom have filed similar suits, had reaped practically all the advantages they would ever reap from the improvements of the district; they had acquired the outlet they sought, and the ditches and levees which they thought so necessary in 1918, when they petitioned to be taxed in the district. Reversing their attitude of acquiescence, suits were brought to cancel these assessments and similar suits were brought by owners of former government land all over Eastern Arkansas.

To revert a little in point of time we will refer now to the reassessment of benefits in 1922. This was not a reassessment such as was considered in the Lee case under the road improvement district law, which amounts only to an annual readjustment or equalization of an assessment.

The reassessment under the drainage law could only be had when the plans of the district had been

changed so as to render the former assessment inequitable. There was no provision of the drainage statute at that time for any annual readjustments or equalization of assessments but only for a reassessment of lands affected by an alteration of plans.

Act 193 Vol. 1 Acts 1917 p. 1060 Sec. 7.
Act 35 Spec. Acts 1919 p. 55 Sec. 3.
C. & M. Dig. Ark. Sec. 3625.

The report of the engineers and of the board filed in the County Court on April 5, 1922, recites at length the reason for the reassessment and for the change of plans and the allegation is made therein and is not contested anywhere in the record that these changes affect all the lands of the district, including the lands in controversy (Rec. p. 77-88). Upon the filing of said report and reassessment notice was published describing all of the lands of the district, and on May 31st and June 1st, 1922 the revised plans and the entire reassessment of benefits based thereon were established by judgment of the County Court (Rec. p. 59-66). There was a hearing in County Court and the record shows more than a page of printed names of persons who appeared at the hearing, but it is not shown that any one appealed from the court's findings. The list includes many of the persons affected by this very decision but does not include Roy Rice (Rec. pp. 61-62).

We contend that this reassessment upon the complete alteration of plans marks a new period equivalent in substance to a new and independent assessment of benefits as of the date June 1, 1922. This date

follows by three years or more the final certificate of entry and the patent issued to Rice for the lands in controversy.

The General Assembly of Arkansas by Act 657 p. 1638 Special Acts of Ark. 1923 passed a complete curative act covering the plans and reassessment of June 1, 1922 which we here copy in full as follows:

> "Section 1. That the reassessment of benefits and damages in Drainage District Number Seven of Poinsett County, Arkansas, as confirmed and established by the Judgment of the County Court of said County on June 1, 1922, and as set out and filed in the assessment book theretofore filed by the Board of Directors in 1922 are found to be just and equitable, and it is found that the improvements planned in said district will result in benefits to the property to the extent established by said County Court on June 1st, 1922, and the assessment roll fixed by the County Court on said day is hereby cured, established and confirmed, until a reassessment be had as provided in the statutes now in force concerning said district, and all defects in said assessment of benefits or of damages are hereby cured, and confirmed and the same is declared valid and effectual; and further that the revised plans of said drainage district heretofore filed be and the same are confirmed.
>
> "Section 2. This Act shall supplement existing acts, and shall not in any wise repeal or affect any portion of any other act affecting said district, all of which shall remain wholly in force.
>
> "Section 3. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared, and this act shall take effect and be in force from and after its passage."

Roy Rice defaulted in paying his drainage assessment as early as 1920, the first year after he received his patent. A due and legal foreclosure decree was rendered therefor, sale was had and a deed made to the district and no question is raised as to the regularity of the proceeding (Rec. 99-102).

Similar decrees for the installments due in 1921, 1922, 1923 and 1924 were had in the Chancery Court of Poinsett County, sales were made and deeds executed to the district just as in the first case (Rec. p. 101-103).

In like manner and by proceedings practically identical in the Poinsett Chancery Court the levee board procured foreclosure decrees for the installments due in the years 1921, 1922, 1923, 1924 and 1925 (Rec. p. 119).

These foreclosure decrees are pleaded as *res judicata* by both districts, since the attack herein made upon the assessment could have been presented as a defense in said cases.

Upon these facts it appears to us, as it did to the Supreme Court of Arkansas, that this case is entirely distinct from the case of *Lee v. Osceola Road District*, *supra*.

ARGUMENT.

POINT A.

This case is entirely distinct in facts and law from the case of Lee v. Osceola and Little River Road District, supra.

Neither this suit nor any of the other numerous suits of similar nature now pending in Eastern Arkansas would have been brought except for the decision of this Honorable Court in the case of *Lee v. Osceola Road District*. A large number of such cases, including the present, were brought against various drainage districts and against the levee district, within about six months after the publication of the opinion in that case.

It seems manifest, therefore, that the case of plaintiff in error is based entirely upon the Lee case and if we can show that this case is entirely distinct from the Lee case in fact and law, then the entire argument of plaintiff in error falls.

Of course this Honorable Court knows better what it meant by its opinion in that case than counsel can possibly know, but as we understand that decision, it simply holds that lands which were formerly government lands cannot be taxed in the hands of a subsequent owner for improvements which were wholly completed while the title was in the United States.

We do not understand the Lee case as erecting a

barrier against the assessment of lands in the hands of private owners for improvements that were made after the government has parted with its title, nor for improvements that were not completed during the time the government still retains ownership. Our interpretation of that case is that it applies to prevent only a retroactive assessment for improvement taxes for work done during the time the land was the property of the United States and before it passed into private ownership.

This is the interpretation placed upon the decision by the Supreme Court of Arkansas in the case sought to be reviewed.

Drainage District 7 Poinsett County v. Exchange Trust Company, 175 Ark. 934.

Furthermore, as we interpret the Lee case it would not prevent the entryman who subsequently obtains the government's title, from expressly waiving his claim to immunity from such taxation, and certainly it would not prevent the government from waiving its immunity by proper Act of Congress, such as was construed in

Perry v. Drainage Dist. 17 Mississippi County, 155 Ark. 89; 295 U. S. 568.

The Lee case quotes and relies upon the decision in *Nevada National Bank v. Provo Irrigation Dist.* 140 Cal. 344.

That decision seems to emphasize the fact that neither the government nor the entryman had consented to the irrigation assessment considered.

In the present case we concede that the government has not consented to any assessment, but we say that

Roy Rice, the entryman, expressly consented by petitioning for the annexation of his lands to this drainage district and for the imposition of the very tax which he seeks to escape in this suit. We contend that he thus waived, as to the drainage district, any claim of immunity that might seem to arise under the language of the Lee case.

A further ground of distinction between the present case and the Lee case is that no plans were filed, no money spent, and no assessment of benefits made as to the lands in controversy until June 23, 1919 which was after not only the final certificate of entry, but twenty days after the actual issuance of the patent to Roy Rice (Rec. 37, 44-50, 69).

In the Lee case it is true there was a reassessment, but, as pointed out in the statement of facts previously, this reassessment was a mere annual readjustment or equalization of the assessments in the road district, such as is provided for in the road district laws but not in the drainage district laws. As to the drainage district, the original assessment was not established on these lands until after the patent was issued and later a reassessment upon a complete change of plans was established in 1922 and confirmed by special act in 1923. No such facts appeared in the Lee case.

In the Lee case the opinion expressly states that the work had been completed before Lee received his final certificate and the reassessment attempted was an attempt to establish a retroactive tax upon the lands of Lee for work that had already been done before he received the title from the government.

The assessment in the Lee case was for a completed improvement while in the present case the drainage assessment was for an improvement for which no contracts were let prior to 1919 nor prior to the patent of this land to Roy Rice.

As to the St. Francis Levee District, it made no attempt to assess the lands until the year following the issuance of the final certificate of entry to Roy Rice. Since its improvements are constantly changing it is difficult to fix a date as to when any particular assessment in the levee district applies to any particular improvement. The levee is a unit and its purpose is to protect all the lands of the district from overflow. Hence the basis of assessment of benefits for the levee is much more general and much less complicated than as to a drainage district. The drainage district built both levees and ditches and each tract of land must be assessed with reference to the benefits to the particular district. A levee protects all land in a more or less equal manner and it is logical that its costs be extended equally over the acreage.

As stated above the drainage district completely reassessed upon an alteration of plans all the lands of the district in 1922 and this assessment was confirmed by a curative act in 1923. These later developments constitute an entirely different case from the facts of the Lee case.

An additional distinction between the present case and the Lee case is that Roy Rice, in the present case, became a petitioner, and through his attorneys actively participated in annexing his lands to the drainage dis-

trict and in procuring the assessment thereon for drainage purposes. In now attacking this assessment we contend that the plaintiff in error should be estopped by having assumed inconsistent judicial positions.

As a further ground of distinction we contend that in the present case, and not in the Lee case, regular suits for foreclosure of delinquent assessments were brought by both the levee board and the drainage district and regular decrees were rendered for five successive years in each district (Rec. pp. 99-103, 119).

The very attack now made upon these assessments could have been set up as a defense in any one of those ten foreclosure suits. That is, in fact, the manner in which the Lee case came before this court. But Roy Rice wholly failed to appear or to make any defense and we contend that these ten foreclosure proceedings in the chancery court constitute *res judicata* as to the right of plaintiff in error, who succeeds to the title of Roy Rice, to contest the assessment either by the levee district or by the drainage district. No such facts existed in the Lee case because as soon as he was sued for foreclosure of the assessment Lee appeared, contested the case and later brought the matter to this court for review.

Other points of distinction between the present case and the Lee case are set out under the head of estoppel in the opinion of the Supreme Court of Arkansas sought to be reviewed. Not only did Roy Rice petition to join the district and to be taxed, but after thus inviting the expenditure he stood by for practically six years after receiving his patent and watched

the district expend more than two million dollars and issue a large amount of bonds for the drainage and reclamation of his lands and those of his neighbors east of the St. Francis River, and he did not object until the improvements were substantially completed nor, in fact until about six months after this court had rendered the decision in the Lee case.

For these reasons we contend that the Supreme Court of Arkansas was correct in holding that the Lee case does not apply to prevent the levy of the assessments complained of in this suit.

POINT B

The decision in the case of Lee v. Osceola Road District, supra, merely holds that lands formerly government lands cannot be assessed after passing into private ownership for improvements wholly completed during the period that the title remained in the government. In the present case neither the drainage district nor the levee district improvements were completed when the government parted with its title, nor in fact are they complete up to the present time.

In Point A we argued that the Lee case applies only to prevent an assessment to pay for an improvement wholly completed while the title remains in the United States. Under this head we will briefly review the facts showing that neither the improvements of the drainage district nor of the levee district were completed on February 14, 1919, the date final certificate of entry issued from the government to Rice, the date when the lands became taxable according to the concession of plaintiff in error.

We will further show that none of the improvements of the drainage district were made until long after that date.

As to the drainage district: Not only were the drainage district's plans not completed on February 14, 1919, the date final certificate was issued, but in fact no plans of the drainage district had even been filed affecting the lands in controversy on that date, nor were any such plans filed until May 24, 1919 more than a year after the lands were annexed to the district. No assessment of benefits was established by the county court as to these lands until June 23, 1919, twenty days after the date of patent, and four months after the certificate of entry (Rec. p. 44).

No contracts were let for any work east of the St. Francis River nor any work affecting the lands in controversy until after the establishment of the benefits not until August 20, 1919 (Rec. p. 90). Later contracts were let through 1920, and in 1923 and in 1924 affecting improvements east of the St. Francis River and affecting the lands in controversy (Rec. p. 91).

The record shows that $2,050,455.78 was expended east of the St. Francis River beginning with the year 1920 and up to 1925. We here copy for the court from Record p. 91 the list of expenditures during each year, east of the St. Francis River:

1920	$ 23,999.68
1921	237,278.49
1922	443,446.17
1923	555,055.89
1924	717,741.60
1925	72,933.95
	$2,050,455.78

It is evident that the expense largely overran the estimate of cost and a very large percentage of this excess expenditure is due to work east of the St. Francis River in the land added on petition of the land owners on March 15, 1918.

At the time of trial there remained $120,000.00 worth of work estimated as uncompleted east of the St. Francis River (Rec. p. 92).

Hence it is manifest that not only was the work of the district not complete on February 14, 1919, the date of final certificate of entry, but in fact no work at all was even commenced until about a year thereafter, and in 1920.

As to the Levee District

The testimony of its engineer shows that there is a continual expenditure for the maintenance of the levee, to construct loops, for emergency work, and for the general strengthening of the levees. His report shows that the levee now contains six times more dirt than was contemplated in 1896, and that the annual revenue is practically six times what it was in 1896.

On account of the changing flood heights, the increased drainage of lands above in the Mississippi Basin and the increased development of the territory necessitating more complete protection, the plans of the levee district are in a constant condition of modification, particularly following any great flood. Hence, we contend that a levee along the Mississippi River can never be considered as a completed improvement, but that it constantly must be changed, strengthened, guard-

ed and maintained, and that such maintenance is as much a part of a levee improvement as the original construction of the dirt embankment under the first plans.

The levee planned in 1896 to protect the basin of the St. Francis and Little River, as it then existed, and with its population and resources as of that date, and with the flood height of the Mississippi River as of that date would be wholly ineffective and absurd as compared with the present situation in the district (Rec. pp. 105-118). For instance, the greatest flood height attained in the Mississippi River at Cairo previous to 1893 (the year the levee district was organized) was 52.17 feet during the year 1883. But in 1913 the river reached a flood height at Cairo of 54.69 feet. This is an increase in flood height at Cairo of 2.52 feet. At Memphis, however, nearer the territory in controversy, the previous maximum flood height was 35.6 feet in 1890, but in 1913 the river reached a height of 46.55 feet, this constituting an increase in flood height at Memphis of 10.95 feet (Rec. p. 109).

We therefore contend that neither the drainage district nor the levee district was a completed improvement at any time while the lands in controversy were the property of the United States, and further contend that the assessments levied do not cover work completed while the title of the lands remained in the United States.

POINT C.

Roy Rice, the entryman under whom plaintiff in error claims title, not only signed a petition that the land in controversy should be annexed to the drainage district, but participated through his attorneys actively in court proceedings perfecting such annexation and actually petitioned in so many words that the assessment now attacked be levied against his lands. Hence he waived any possible immunity that might have been claimed because the lands were formerly government lands.

The line of distinction between waiver and estoppel is rather indefinite, but generally speaking a waiver is the intentional relinquishment of a known right. It is a voluntary act and implies an election by the party to dispense with something of value or to forego some advantage which he might at his option have demanded and insisted on. Waiver is applicable to practically all rights or privileges to which a person is legally entitled, whether secured by contract, conferred by a statute or guaranteed by the constitution, provided such right rests in the individual for his sole benefit.

27 R. C. L. pp. 804 806.

The United States Circuit Court of Appeals for the Eighth Circuit passing on the Colorado Irrigation Statutes, held that a homestead entryman prior to receiving his patent might waive his right to be excluded from an irrigation district on the ground that the land was not in a physical condition to be irrigated, where, instead of objecting to the inclusion of his lands within the district, he actually petitioned for inclusion

as soon as he should acquire a freehold title. A number of cases are cited therein as supporting the conclusion.

Nile Irrigation Co. v. *Gas Securities Co.*, 248 Fed. 861.

This is the only case we have found directly holding that an entryman, prior to the issuance of the patent, may waive any immunity by signing a petition for improvements. However, later under this point, we present authorities showing that an entryman has an inceptive title sufficient to support similar waivers.

> "Active participation or encouragement in causing an improvement to be made will estop the owner engaged therein from denying the validity of the proceedings and the assessment made in pursuance thereto. This rule is well established and is founded upon principles of justice."

It does not apply where the assessment is absolutely void.

> 25 R. C. L. pp. 178, 181.
> *English* v. *Arizona*, 214 U. S. 359.
> *Chadwick* v. *Kelly*, 187 U. S. 540, 546.
> *Shepard* v. *Barron*, 194 U. S. 553.

From the latter case we quote the opinion of the court beginning on page 567 as follows:

> "Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains, and some of the cases go so

far in that direction as to hold that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. Cooley, Taxn. p. 573 and cases cited in note 5; *Tash* v. *Adams*, 10 Cush. 252; *Bidwell* v. *Pittsburgh*, 85 Pa. 412, 27 Am. Rep. 662; *Shattc* v. *Thompson*, 15 Wall. 151, 21 L. Ed. 123."

"Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request, and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to a third person."

See also:

New Orleans v. *Warner*, 175 U. S. 120.
Wright v. *Davidson*, 181 U. S. 371.

In 9 A. L. R. there is an elaborate annotation following the seven cases beginning with

Moore v. *City of Yonkers*, 225 Fed. 485;
9 A. L. R. 500.

This annotation covers the field of "Loss of Right to Contest Assessment in Proceeding for Street or Sewer Improvement by Waiver, Estoppel, or the Like." The question of estoppel by petitioning for improve-

ment is annotated beginning page 649 and by acquiescence or accepting of benefits beginning at page 757.

Immediately following that annotation there is reported in 9 A. L. R. p. 835 the case of

People of Illinois v. *Letempt*, 272 Ill. 586.

This case discusses estoppel by signing the petition for the assessment and the bonds.

Just following this case, as reported in 9 A. L. R. is the case of

Geib v. *County of Morrison*, 119 Minn. 261, 9 L. R. 839

which covers estoppel by acquiescence and consent to the construction of drains.

To these two cases is appended an annotation on the immediate question in controversy in the present case, "Loss of Right to Contest Assessment in Drainage Proceeding by Waiver, Estoppel, or the Like." This annotation begins on page 842 and the question of estoppel by petitioning for or promoting this improvement is discussed beginning with page 844, 847 and estoppel by acquiescence or acceptance of benefits is discussed in the note beginning with page 888.

It seems that all the cases are collected in these annotations and the rule is well established by the weight of authority that active participation by signing the petition and promoting the improvements, as well as by acquiescence and acceptance of benefits, will estop a landowner from contesting an assessment that is not absolutely arbitrary or entirely void for jurisdictional defects.

In the case sought to be reviewed here, the Supreme Court of Arkansas has directly held that Roy Rice waived his claims and is estopped by his conduct.

Plaintiff in error seems to argue that the Supreme Court of Arkansas held that all of the elements of estoppel refer to conduct of Rice *prior* to the issuance of final certificate of entry to him by the government. As a matter of fact, in the opinion of the Supreme Court of Arkansas, beginning on page 929 of 175 Ark. the court said:

> "But it is claimed that after appellee became the beneficial owner of the land, he was guilty of such acts and conduct as would estop him from attacking the validity of the annexation proceedings and the subsequent assessment of his lands thereunder. It is true that appellee and others filed a petition in 1918 for the annexation of their lands to the drainage district, but the change of plans was not made and the assessment of benefits was not made until June 1919, at which time appellee and the other landowners who petitioned for the annexation had received final certificates of entry from the United States."

On page 940 the court said:

> "Pursuant to the annexation petition, the land of appellee and the land of others, comprising at least 3,280 acres, were annexed to the original drainage district and brought under the operation of the act creating it. The landowners voluntarily asked for the privilege of becoming subject to all its provisions. In effect they asked for the assessment of benefits on their land and that they should become subject to the provisions of the act just as the land contained in the original district. The commissioners of the drainage district assented to their request, and the county court acted upon it and changed the formation of the district and the improvements to be made thereunder in a substantial way. In the very nature of things the added district imposed a very

much larger expense upon the property owners of the whole district in order to afford protection to the lands of appellee and others who desired to be brought under the provisions of the act creating the drainage district and to participate in the benefits to be derived therefrom.

"It was necessary to issue a very much larger bonded indebtedness in order to accomplish this purpose. The property owners in the original district assumed the larger additional indebtedness, relying upon the acts and conduct of the petitioners. By petitioning for the annexation of their lands to the district, appellee and others declared that they would submit themselves to all the responsibilities and burdens imposed by the original act. They purposely caused the authorities to believe this as a matter of fact. Relying upon their acts and conduct, the commissioners largely increased the bond issue and expended money in the construction of the improvements in the amended district so as to reclaim and protect the lands of appellee and the other petitioners for the annexation from the floods. They permitted their lands to be assessed in June, 1919, after they had become the beneficial owners of them. In 1922 the commissioners, under the belief that the old assessments had become unequal, made a complete reassessment of the benefits against all the lands of the district, including those who had petitioned for the assessment. They proceeded with the work under the amended plans, and appellee and other landowners similarly situated enjoyed the benefits. To now permit them to deny the assurance given by their own acts and conduct, which was continued during the progress of the work, would work a fraud upon the drainage district and the landowners situated within its original boundaries, and this cannot receive the sanction of law. The drainage district and the commissioners thereof had no reason to believe that the petitioners for the annexation would

allege any invalidity in the law which they were asking to have extended for the protection of their land. The drainage district and all interested under the original act have been misled by the affirmative acts and conduct of appellees and others petitioning for the annexation of their lands to the district.

"Hence we are of the opinion that appellee and those similarly situated are estopped from attacking the validity of the annexation proceedings and the assessment of benefits against their land authorized for the construction of the drainage district and levees contemplated under the act. Having expressly consented to the taxation of their land after they had become the beneficial owners thereof, and the drainage district having acted thereon and made large expenditures in reliance upon their consent, such consent cannot be withdrawn."

In addition to that decision by the Supreme Court of Arkansas there are a number of other cases holding that a landowner may be estopped to contest an assessment by taking part in the creation of a district and inviting expenditures.

Fitzgerald v. *Walker*, 55 Ark. 148
Rector v. *Board*, 50 Ark. 116
Harnwell v. *White*, 115 Ark. 88
Meyer v. *Board*, 148 Ark. 622

Roy Rice, the homestead entryman, had sufficient interest in the land in controversy to justify his signature to the petition and upon which to base our contention that he waived any claim of immunity against the assessment in this case.

Rice had entered this land in 1917 and he remained in possession and finally received his final certificate

on February 14, 1919 and his final patent on June 3, 1919. Plaintiff in error concedes that the land became taxable and subject to special assessments after February 14, 1919 the date final certificate was issued. This is the holding of this court in a number of cases, including

Wisconsin Central R. R. Co. v. Price County
133 U. S. 496.

The case just cited expressly places taxation for state purposes on the identical basis with local and special assessments under state authority and says that neither can be supported while the government holds the title. But it holds that when the government has parted with the title by the issuance of final certificate, then the purchaser "will be treated as the beneficial owner of the land and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property and is not excluded from its enjoyment shall not be permitted to use the legal title of the government to avoid his just share of state taxation."

But it is not only upon the issuance of the final certificate that the entryman under the homestead laws becomes entitled to certain rights, but upon the entry "he has a substantial inceptive title sufficient as against third parties to support suits in equity or at law, although he may not yet have taken actual possession of the land." Hence a patentee under the homestead laws may under the doctrine of relation maintain an action to recover damages for timber cut from his land

by a trespasser after the homesteader had made his entry but before he had taken actual possession.

Knapp v. *Alexander Lbr Co*, 237 U. S. 162.

This case cites

United States v. *Buchanan*, 232 U. S. 72.

Gauthier v. *Morrison*, 232 U. S. 452.

See also

Witherspoon v. *Duncan* (71 U. S. 210), 4 Wall. 210.

Doran v. *Kennedy*, 237 U. S. 362.

The Supreme Court of Arkansas passed upon the right of a homesteader in Drainage District 17 Mississippi County, the companion district to Drainage District 7 Poinsett County, involved in this suit. The court held that from the date of making formal entry of his claim a homesteader upon such lands has such a vested right of property therein as will permit him before the issuance of a patent to recover damages for an injury to the land and hence is entitled to damages from a drainage district for right of way for its ditches.

Schmidt v. *D. D.* 17, 140 Ark. 541.

Homestead lands are exempted from liability for debts contracted prior to the issuing of patent, but this exemption "is designed merely to protect the settler from a forced sale on a debt contracted prior to the time designated (the time when patent should issue) and does not preclude him from borrowing money and voluntarily creating a lien on the land by way of mortgage to secure the same, or prevent the enforcement of such mortgage."

32 Cyc. p. 1084.

22 R. C. L. p. 325 Sec. 74.

The whole question of the right to mortgage homestead lands prior to the issuance of final certificate or patent has been considered in a late case and exhaustively annotated.

Bashore v. Adolf (Id.), 238 Pac. 534, 41 A. L. R. 932.

It is there set out that an entryman who attempts to mortgage his land prior to receiving his final certificate or patent is estopped as against the mortgage from denying the validity of the lien, regardless of the provision exempting homesteads from debt.

41 A. L. R. p. 949, 951.
Stark v. Morgan, 73 Ks. 453, 6 L. R. A. N. S. p. 934 and note.

In this very record the rights of the homestead entryman are protected and acknowledged in the decree rendered in the United States District Court in the Blumenthal (or Bluthenthal) case which enjoins the defendants from interfering with the possession of entrymen who occupy pursuant to the homestead laws (Rec. p. 104).

From these authorities and others that might be cited, and particularly from the case of

Nile v. Irrigation District, supra

we believe it clearly established that the homestead entryman may waive the immunity of his lands from special assessment and may voluntarily assume the lien for such special assessments by signing a petition for inclusion of his lands within the district and by participating in the proceedings. Certainly he ought

to have the power to ratify, after acquiring the final certificate, his previous signature to the petition and to estop himself by subsequent activity in the proceedings as well as by acquiescence.

The court will note that certainly the drainage tax would not hinder the government in disposing of these lands, because the entrymen themselves petitioned for the tax and, except for the drainage improvements paid for by the tax, the land admittedly would be completely ruined by flood waters.

The recital of facts shows that this particular land, except for the outlet afforded by Drainage District 7, would be ruined by the floodwaters of Drainage District No. 17, Mississippi County. This was the reason for the urgent desire of the landowners to be added to Drainage District No. 7. Whatever value the lands have for farming purposes is contributed by the improvement districts, defendants in error in this case. Except for these improvements, therefore, the government could not have disposed of these lands because they would have been so wet as to be incapable of cultivation.

We contend, therefore, that Roy Rice expressly waived any immunity he might have claimed under the doctrine of the Lee case.

POINT D.

No plans were filed by the drainage district affecting the lands in controversy while the title remained in the government, nor until after Roy Rice received his final certificate of entry. No assessment of benefits nor levy of tax nor issue of bonds were made by the drainage district affecting the land in controversy until after such final certificate of entry was issued by the government to Roy Rice.

The levee board did not assess the lands in controversy until after the issuance of final certificate of entry to Roy Rice.

We have already sufficiently recited the facts vindicating this allegation. These facts are set out in the opinion of the Supreme Court of the State of Arkansas heretofore quoted. They are further carried in the stipulation of counsel in the record in a most explicit manner (Rec. 27-28) heretofore copied.

We will not elaborate upon this question of fact any further, except that we will here tabulate, for the convenience of the court the comparative dates from the record affecting the lands in controversy:

July 2, 1913—Certificate of entry to Roy Rice.

February 14, 1919—Final certificate was issued.

June 3, 1919—Patent issued (Rec. p. 69).

January 25, 1918—Petition filed by Rice that his land be annexed to the district (Rec. p. 30).

March 15, 1918—Lands annexed by county court order (Rec. p. 35).

May 24, 1919—Plans filed for improvements east of St. Francis River (Rec. p. 37).

May 24, 1919—First assessment filed affecting lands in controversy (Rec. p. 37).

June 23, 1919—Plans and assessments approved as to lands in controversy (Rec. p. 44).

August 1, 1919—First bond issue affecting said lands (Rec. p. 96).

Sept. 1, 1919—Entry of levying order supporting said bonds (Rec. p. 95).

August 20, 1919—First contracts let affecting the lands in controversy (Rec. p. 90).

In Year 1920—First money expended east of St. Francis River (Rec. p. 91).

1920—First foreclosure decree for drainage taxes on said lands was for the 1920 installment (Rec. p. 99).

February 16, 1923—Entry of first foreclosure decree for levee tax, for 1921 installment (Rec. p. 119).

February 5, 1919—First curative Act of Legislature confirming addition of said lands and assessments thereon.

April 5, 1922—Plans altering original plans filed (Rec. p. 57).

April 5, 1922—Complete reassessment of benefits filed covering such change of plans (Rec. p. 57).

May 31 and June 1, 1922—Judgment of county court confirming altered plans and reassessment rendered (Rec. pp. 59, 63).

March 23, 1923—Curative Act approved, confirming such change of plans and reassessment.

June 8, 1925—Date of decision of this court in Lee case.

December 12, 1925—Complaint in this case filed.

Hence nothing was done as to the drainage district as to these lands until after the final certificate of entry was issued.

As to the levee board, absolutely no attempt was made to assess these lands until the final certificate was entered. The practice of the levee board has been for years to assess lands after the issuance of final certificate of entry.

POINT E.

As to the drainage district the plans were completely modified and a complete reassessment of the benefits to all the lands of the district was established by order of the County Court on June 1, 1922, practically three years after the government had entirely parted with its title both legal and equitable. This was not such an annual readjustment and equalization of assessments as is permitted by the highway acts, nor such as is discussed in the case of Lee vs. Osceola Road District, supra, but is a reassessment based upon the altered plans only. The altered plans rendered the former assessment inequitable and all the lands of the district were reassessed. This marks a new, complete and independent assessment based upon plans adopted three years after the government parted with its title and hence the lands in controversy became subject to the reassessment, whether the previous assessment was valid or not.

Under the road law, considered in the Lee case, there was authority for an annual readjustment of the assessment, or so-called annual reassessment. In the Lee case the improvements had been finished before

this reassessment was made and the reassessment was made after the entryman received his final certificate, but was retroactive and covered improvements completed before he received his final certificate. The court in the Lee case held that such a reassessment would not be sustained.

Under the drainage statutes, however, there was no power for an annual reassessment or adjustment, but the law only provided that if the district found it necessary to alter its plans it might reassess the land the assessment of which was rendered inequitable by such change of plans. Under the Act of 1919 confirming the addition of this territory in controversy to the district, Act 35 Special Acts of 1919, p. 52, express power to alter the plans of the district and to reassess the benefits and damages upon such change of plans was given in Section 4.

In the same act, and in Section 3, all of the powers possessed by any drainage district organized under the general act were conferred also upon this district.

The general act concerning drainage districts affecting change of plans and reassessment is contained in C. & M. Digest of Ark., Sec. 3625.

The district has no other power to make a reassessment and, as will be noted, this is in fact a new or additional assessment and not a mere readjustment or equalization of the existing assessment.

The report of the board of the drainage district and the elaborate hearing had upon the plans showed that there were very substantial changes in the entire

plans of the district. Not only was the floodway changed, but also a lock and dam across the channel of the St. Francis River was necessitated and this lock and dam affects directly all of the territory in controversy and in fact all of the territory east of the St. Francis River. The reassessment was filed, notice was given and a hearing was had on June 1, 1922, at which a very large number of landowners appeared to contest, but finally they accepted the reassessment which raised the original assessment of benefits a certain percentage on all the lands of the district (Rec. p. 65).

The judgment of the county court was accordingly rendered sustaining and establishing the reassessment.

We do not contend that this reassessment and this complete change of plans worked any change in the entity of the drainage district. We concede that any improvement district must be formed for a specific purpose and that the entire purpose cannot be changed and preserve the entity of the district. However, our contention is that this reassessment, based upon a complete change of plans and affecting all of the lands of the district, does in fact start a new and independent period at which Roy Rice should have made his contest of this assessment and since it was three years after the title had passed from the United States Government the reassessment concerned Roy Rice only and did not concern the question of immunity of the Government lands from taxation. Roy Rice at the time this reassessment was made, had possessed the absolute title to the land for three years and he could not go back

and hide behind the skirts of the Government to avoid paying his just share of this reassessment.

Wisconsin Central R. R. v. Price County, supra.

From the list of expenditures made by the district in the territory in controversy during the years of 1922 to 1925, inclusive, it will be observed that very much the larger part of the two million dollars expended in the eastern part of Drainage District 7, including the annexed lands in controversy, was spent during and after 1922. More than a half million dollars was spent in 1923 and more than seven hundred thousand dollars in 1924. Large bond issues were made based upon this reassessment and forming the source from which the district secured funds for the work. Reassessments of this nature have been considered by the Supreme Court of Arkansas in numerous cases, particularly in the case wherein a review was sought before this court, and affecting the sister district, No. 17, of Mississippi County.

Pierce v. D. D. 17 Miss. County, supra.

The same statute affecting Drainage District 17, of Mississippi County and providing for addition of lands and reassessment of benefits was considered by the Circuit Court of Appeals for the Eighth Circuit in *Caldwell v. Guardian Trust Co.*, 26 Fed. 2nd Ser. 218.

As to Drainage District No. 17, the same statute was before the Supreme Court of Arkansas again in the case of

Chicago Mill & Lbr. Co. v. D. D. 17, 172 Ark. 1059.

A similar but less comprehensive proceeding for reassessment was upheld by this Honorable Court in *St. Louis, etc., Co. v. Kansas City*, 241 U. S. 419.

We say, therefore, that this reassessment of benefits in 1922 at the hearing for which numerous parties appeared and of which Roy Rice had notice and could have appeared, constitutes a new and independent assessment following by three years the time the government parted with its title, and marking a new period barring attack on the reassessment even if the original assessment in 1919 had been subject to attack by Roy Rice.

POINT F.

By Act of the General Assembly of Arkansas in 1923 the alteration of plans and the reassessment of benefits established in the County Court on June 1, 1922, referred to in the last preceding division of this brief, were cured and confirmed. This curative Act is a bar to the present attack upon the drainage district reassessment.

This Act is quoted in the statement of facts in this brief.

The decisions are innumerable in Arkansas as to the effect of curative Acts, and, likewise, there are a large number of such decisions in the Supreme Court of the United States.

The general rule is that a legislature may assess land for special improvements directly or it may dele-

gate such power to some board of directors or other tribunal. That whatever it originally possessed the power to do, it can subsequently approve and confirm by curative Act, and for this reason can cure the proceedings of a drainage district and its assessments at a later date, even if they are wholly irregular when originally established.

Some of the decisions of this Honorable Court upholding curative Acts are

Read v. *City of Plattsmouth*, 107 U. S. 568.
First National Bank v. *County of Yankton*, 101 U. S. 129.
Utter v. *Franklin*, 172 U. S. 416.
Town of Thompson v. *Perrine*, 103 U. S. 806.

Some of the cases in the Supreme Court of Arkansas concerning curative Acts, are:

Road Imp. Dist v. *St. L. S. F. R. R. Co.*, 164 Ark. 442.
Pierce v. *D. D. 17 Miss. County, supra.*
Green v. *Abraham*, 43 Ark. 420.
VanHook v. *McNeal Monument Co.*, 107 Ark. 292.
Faser v. *Wayne*, 134 Ark. 30.
Timms v. *Mack*, 147 Ark. 112.
Green v. *Williams*, 169 Ark. 1198.
Chicago M. & L. Co. v. *D. D. 17 Miss. Co.*, 172 Ark. 1059.

We could multiply these citations indefinitely as to the effect of curative Acts. It seems to us that the passage of this curative Act by the General Assembly in 1923, four years after the government parted with its title, constitutes a bar to the maintenance of this action by Roy Rice or his successor.

POINT G.

Beginning with the installment of assessment due the drainage district in 1920 and with the installment due the levee district in 1921, foreclosure suits for delinquent assessments and reassessments were regularly brought covering the years 1920-1924 inclusive in the drainage district and 1921-1925 inclusive in the levee district, and in each case due service was had pursuant to the law, and Roy Rice could have presented as a defense in each foreclosure suit the same questions now raised by plaintiff in error in the attack upon the validity of the assessments. Hence those decrees of Poinsett Chancery Court are res judicata of the very issues raised in the present controversy and are so pleaded.

There should be an end to litigation and hence when a person has had one full opportunity to present his claim or defense, the judgment in that case should and does bar him from maintaining another and different suit and is *res judicata* of the controversy.

No question whatever is made as to the absolute regularity of notice, pleadings, decree and proceedings generally in the several foreclosure cases for delinquent assessments brought by both districts. The drainage district sued for the installment due in 1920 following the assessment which was made in 1919. Roy Rice did not appear, and after due notice a decree was rendered, his lands were sold to the district, reported to the court and approved and deed to the drainage district executed.

The same thing occurred during the successive years for the installments due in 1921, 1922, 1923 and

1924. Thus the drainage district procured five degrees of foreclosure against Roy Rice, or, to be more exact, against the lands in controversy, which were then owned by Roy Rice.

The levee district also procured five decrees of foreclosure against the same lands for its installments beginning with 1921 and it included the decree for 1925.

The owner of the land, Roy Rice, who had the absolute title as early as 1920, could have appeared in any one of these ten foreclosure proceedings in the Chancery Court, and could have set up every matter that he has set up in the present controversy.

There is certainly no need to cite cases to prove that this very subject matter could have been presented in these foreclosure proceedings because the decision of this court in the case of Lee against Road District under which the complaint is filed, was presented in identically that manner. Lee and others were defendants in a foreclosure suit brought for the collection of an assessment of road tax and they appeared and set up that the assessment was void because the improvement was completed while the title to the lands remained in the United States Government. This court heard them as to that defense and held in their favor and canceled the assessment. Hence the Lee case is conclusive and absolute authority to justify Roy Rice in presenting his defense in any one of these ten foreclosure suits. But he did not present these defenses. Instead, although duly served, he made default.

We contend that under the overwhelming weight of authority he should be estopped now to bring an independent suit attacking the assessment. Some of the decisions of the Supreme Court of Arkansas in point are:

Howard Sevier Road Imp. Dist. v. Hunt, 166 Ark. 62.
Tri County Highway Dist. v. Vincennes Bridge Co., 170 Ark. 22.
Gordon v. Clark, 149 Ark. 173.
Shaw v. Polk, 152 Ark. 18.
Taylor v. King, 135 Ark. 43.
Toll v. Toll, 156 Ark. 139.
Mo. Pac. R. R. Co. v. Conway County Bridge Dist., 142 Ark. 1.

Some of the numerous decisions of this court applicable are the following:

City of New Orleans v. Citizens Bank of La., 167 U. S. 371.
Southern Pac. R. R. Co. v. United States, 168 U. S. 1.
City of New Orleans v. Warner, 175 U. S. 120.
Fidelity Nat. Bank v. Swope, 274 U. S. 123.
U. S. Trust Co. v. New Mexico, 183 U. S. 535.
Baldwin v. State of Maryland, 179 U. S. 220.
Cromwell v. County of Sac, 94 U. S. 351.
Bates v. Bode, 245 U. S. 520.

See also:

34 C. J. Sec. 1327 p. 920.
Ib. Sec. 1331 p. 923.

The principle of *res judicata* applies to tax proceedings just as it does to ordinary litigation between individuals.

34 C. J. Sec. 1381 p. 966.
2 Freeman on Judgments, 5th Ed. Sec. 951.
Fidelity Nat. Bank v. Swope, 274 U. S. 123.

And see other cases *supra*.

We therefore contend that the matters set up in the complaint are *res judicata* by reason of the ten foreclosure decrees, five in respect to each district, shown in this record.

POINT H.

Roy Rice, the predecessor in title of plaintiff in error, not only waived his right to claim immunity for his lands under shelter of the government title by signing the petition and activity in annexing his land, but he also became estopped by assuming inconsistent judicial positions. In the first place, through his attorney, he appeared as a petitioner for the annexation of this land to the district, and for the assessment of a tax for the improvements. In the second place he failed to appear in court to contest the original assessment in 1919 of his lands, the reassessment in 1922, and also made default in ten foreclosure proceedings in the chancery court (five for drainage district taxes, five for levee district taxes). His position in the present suit is inconsistent with these previous legal positions and hence he is estopped.

This question is rather closely interlocked with the other elements of estoppel but the general rule as to inconsistent legal positions is as follows:

"It may be laid down as a general rule that a party will not be allowed, in a subsequent judicial proceeding, to take a position in conflict with a position taken by him in a former judicial proceeding where the later position is to the prejudice of the adverse party and the parties and the questions involved are the same."

10 R. C. L. p. 702, Sec. 29.
Ib. p. 698 *et seq.*, Secs. 26, *et seq.*
Ib. p. 723, Sec. 45.

See also:

The Philadelphia, etc., R. R. Co. v. Howard, 13 How. p. 305.
Shutte v. Thompson, 82 U. S. 151.
Daniels v. Tearney, 102 U. S. 415.
Davis v. Wakelee, 156 U. S. 680.
Pierce v. Somerset Ry., 171 U. S. 641.

POINT I.

Roy Rice also should be held estopped because, after inviting the construction of these improvements and the imposition of this tax by the drainage district, he stood by without objection permitting over two million dollars to be expended on the lands which he and his neighbors caused to be annexed to the drainage district, and did not object to the assessment nor to the expenditures until the bulk of the improvements were completed; nor in fact until six months after the rendition of the decision of this honorable court in the case of Lee vs. Osceola Road District, supra.

In the case of

Chadwick v. Kelly, 187 U. S. 540

this court held the plaintiff in error barred for the following among other reasons:

> "The plaintiff in error did not raise such a question in time to stay the work *in limine*. He awaited the completion of the work, and until his property had received the benefits, whatever they were, of the improvement."

In the case of

English v. *Arizona*, 214 U. S. 359,

this honorable court held that English was barred because after appearing before the commissioners and protesting against his assessment for the sole purpose of saving the question for review, he then actively interested himself in the sale of the bonds of the district. The court said, "There is therefore, ground for the contention that such conduct constituted a waiver of all objections to the assessment" (Rec. p. 365).

Under Point C as to waiver, we referred to the elaborate note appended to the case beginning with

Moore v. *Yonkers*, 9 A. L. R. 590.

And as to drainage districts, the cases and notes beginning with

9 A. L. R. p. 835, note 942, 844, 847, 888

As stated before, a very elaborate collection of cases upon these points is contained in this note.

We have previously cited four cases from the Supreme Court of Arkansas beginning with

Rector v. *Board*, 50 Ark. 116,

holding that a property owner may estop himself by acquiescence as well as by activity. It seems to us that the present is a typical case, for Roy Rice did not ob-

ject until his lands were improved, although he had petitioned for the improvement and, having reaped the full benefit of the enormous expenditure of the district, he now seeks to shift the burden to his neighbors. He should be held estopped.

See also 10 R. C. L. p. 723, Sec. 45.

POINT J.

The Act of Congress considered in the case of Pierce vs. Drainage District 17, 41 Stat. at Large Pt. 1 Chap. 47, p. 392, permitting the assessment of "unentered, unreserved public lands and all of those entered lands for which no final certificates have been issued," has no bearing upon this controversy because it was not passed until January 17, 1920, whereas the final certificate of entry to Roy Rice had issued nearly a year previously and the patent itself had issued previously, on June 3, 1919.

All that is necessary to show that this act can have no possible application and could never have affected the lands in controversy is to recite the dates just given.

On page 12 of the brief of plaintiff in error, it sets out in italics a statement that none of these lands were included within that act. Elsewhere in the brief, plaintiff in error claims that the drainage district had apparently overlooked the fact that this statute did not apply to these land when it reassessed in 1922 (Brief of Plaintiff in Error, p. 36). This contention is obviously baseless because the act could not possibly have referred to lands which had been entered and patented about a year before its passage.

The language of plaintiff in error, on page 36, in stating that in 1922 the drainage district was "negligent" in overlooking the fact that this act did not apply is wholly unjustified, because an act affecting lands unentered as late as 1920 could not possibly cover lands for which final certificate had been entered nearly a year previously, or in February 1919. The language of the board's report in 1922 upon the assessment obviously refers to an entirely different territory than the one in controversy. This Act of Congress is copied in brief of plaintiff in error on pages 11 and 12.

POINT K.

We now discuss before concluding the theory of plaintiff in error that a "potential" or "inchoate" lien existed against all the lands within the boundaries of either district upon the creation of the district.

The plaintiff in error has practically abandoned that contention before this court, but it was presented in the Chancery Court and in the Supreme Court of Arkansas, and in fact the Chancellor based his decision upon it. This ingenious theory was that upon the creation of the levee board an "inchoate" or "potential" lien was established against every acre of land embraced within its outside boundaries. That if any land within those boundaries was government land in 1893 that inchoate lien theory attached an immunity to such lands, and that never thereafter could those lands be assessed for levee improvements of the St. Francis Levee District.

The theory also embraced the drainage district and it was argued that when the district was created in 1917 an inchoate or potential lien existed, not only as against the lands embraced within the boundaries of that district, but also against lands which might be added thereto later.

To support this rather unique argument the only authority cited was some general language from Page and Jones on Taxation by Assessment, and the same authority is cited here but without elaboration.

We think this theory so entirely tenuous that the plaintiff in error shows good judgment by not presenting it to this court. However, we wish briefly to refer to it since it was actually the basis of the Chancellor's original decision.

How could a potential or inchoate lien exist in Drainage District 7 as against lands which were not included within its boundaries? How could a potential or inchoate lien exist as to the levee district against lands which were meandered and called "Sunk Lands," "Lakes," or "Unsurveyed Lands" at the time the levee district was created, and for fifteen years or so thereafter, until the government resurveyed the entire area and established new meander lines.

If an inchoate lien existed from the organization of the district, did the lien cover the original levee planned in 1896, or does it cover the levee of 1925 which was six times as large as the original levee? If an inchoate lien applies to Drainage District 7 did it apply for the plans of 1919 or did it apply to the entire changed plans of 1922?

If the inchoate lien theory applies to the drainage district, then we have a very unique situation as to 12,000 additional acres of "Sunk Lands" east of the St. Francis River not embraced in this controversy. At one time it was planned to protect this additional acreage by moving the levee on the east side of the lake further west, plans were formed and the assessment was made and filed, notice was given and at the hearing a very large number of landowners appeared. The drainage district submitted to the landowners present the question of whether a majority desired that the levee be built on the new line and that the assessment be made, or whether they desired that the new plans and the new assessment be abandoned. The majority favored the elimination of those lands both from protection and assessment and the board thereupon in open court withdrew its plans, its assessment books, and this 12,000 acres was left unassessed, outside the levees of the district and unprotected from the St. Francis River (Rec. pp. 55-57). Yet, according to the potential lien theory of plaintiff in error these lands are still subject to some kind of a cloud and if they were government lands not included within the Act of Congress of January, 1920, a suit might be maintained to cancel this inchoate lien. This seems wholly baseless to us.

However, the authorities do not justify any such contention.

> "In the nature of things, no tax or assessment can exist, so as to become a lien or en-

cumbrance upon real estate until the amount thereof is ascertained and determined."

Words & Phrases 2nd Ser. Vol. 3 p. 30.

Citing:

Gillmore v. *Dale* (Utah) 75 Pac. 932.

If there were any such thing as a potential lien it certainly should have been considered by the Supreme Court of Arkansas in a case very similar to the present wherein is considered the Act of Congress of 1920 above referred to, the case of

Pierce v. *D. D.*, 17 Miss. Co., *supra*.

In the Pierce case if the potential lien theory was of any force, there had been a potential lien or cloud on Pierce's title for three years prior to the passage of the Act of Congress of 1920, but the court does not mention it even remotely.

Furthermore, in the case in this court which considered the whole theory of taxation by assessment as due process of law under the Irrigation Act of California, there is no reference to any potential lien dating from the mere formation of any district.

Fallbrook Irrigation Co. v. *Bradley*, 164 U. S. 112.

Plaintiff in error substitutes for his potential lien theory the question that the lands east of the St. Francis River might have been subject to an assessment for the preliminary expenses of the district if the district had failed to undertake the improvements, and cites

Houck v. *Little River Dist.*, 239 U. S. 254.

This case merely upholds the right of a general assembly to fix a flat tax per acre upon lands for the payment of preliminary expense of surveys and the like. There is no reference to any other lien than that fixed by the statute.

The time when drainage and levee liens take effect are matters of statutory regulation and the statute is clear as to both of the districts in the present suit. Upon lands added to the district the assessment of benefits, when confirmed by the court, has the force and effect of a judgment and therefore, of course, becomes a lien from the time the Court confirms it.

C. & M. Dig. of Ark., Sec. 3615.

The annual tax levy is also a lien from the time it is levied by the court.

C. & M. Dig. of Ark., Sec. 3618.

A lien upon the entire revenue of the district to support the bonds is provided by

C. & M. Dig. of Ark., Sec. 3634.

These provisions are contained in the general law of drainage districts, which applies also to the present district. However, in the original Act of 1917 creating the drainage district identical provisions are included in Sections 9, 13 and 28.

As to the levee district the amendatory act applicable provides that the annual tax levy, not exceeding twenty five cents per acre upon the betterments, shall constitute a lien.

Act 272 Sec. 4 Vol. 2 Acts of Ark. 1917, p. 1448.

Conclusion.

As stated in the outset of this brief the question is whether these former "Sunk Lands" shall entirely escape assessment for their entire history on account of the fact that they were once government lands at the time the districts were created. We have shown that the very value of these lands is due to the improvements for which these assessments were levied. Without the improvements the lands would still be "Sunk Lands," wet, overflowed, and worthless. The neighbors of Roy Rice and these other former homesteaders have burdened their lands with a tremendous tax to protect them from floods and to drain them. The tax in the drainage district was invited by Roy Rice and the other persons concerned in this decision and except for their activity they would have been left overflowed but untaxed.

In the Lee case this court suggested that the assessment in question there might hinder the government in the disposal of its homestead lands. Such cannot be the effect in the present case because on account of the physical situation of these lands between the two large drainage districts, they would have remained worthless, whether government lands or individual lands, except for the improvements of these districts, according to the amended plans.

The government by the Act of Congress, permitting the assessment of public lands that remained unentered and unpatented in 1920, expressed its belief

that these drainage improvements were essential and that Act of Congress rendered them liable to the assessment. This is a finding by the lawmaking body of the necessity and importance of this reclamation work to lands similarly situated.

In view of the fact that the Act of Congress was not passed until 1920 it could not apply to the lands in controversy. But certainly it evidences a waiver by the government of the immunity of government lands within the district after 1920. We concede that the Act does not refer to this particular area, but it does refer to areas quite similar in every respect.

Every principle of justice seems to us to indicate that these lands should bear their just proportion of the cost of the reclamation by these two districts.

For all the various reasons shown herein and as set out very clearly by the decision of the Supreme Court of Arkansas, we earnestly contend that the decision of that court is correct and should be affirmed.

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